U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-E-L-, INC.

DATE: MAY 30, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a laboratory that provides research services and analyzes biological, chemical, and hazardous wastes, seeks to employ the Beneficiary as a chemist. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree or its equivalent. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national with a master's degree, or a bachelor's degree followed by five years of experience, for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's qualifications for the offered position and the requested classification.

On appeal, the Petitioner asserts that, contrary to the Director's decision, the record establishes the Beneficiary's possession of five years of qualifying, post-baccalaureate experience.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the minimum requirements of a certified position and a requested classification. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. REQUIREMENTS OF THE CLASSIFICATION AND POSITION

As previously indicated, advanced degree professionals must have "advanced degrees or their equivalent." Section 203(b)(2)(A) of the Act. The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d. 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum educational requirements of the offered position of chemist as a U.S. bachelor's degree or a foreign equivalent degree in chemistry, biochemistry, or chemical engineering. The certification also states that the position requires five years of experience as a biochemist, analyst, researcher, or scientist. The certification indicates that an alternate combination of education and experience is unacceptable.

In addition, Part H.14 of the labor certification ("Special skills or other requirements") states: "60 months of progressive experience as any type of Chemist, Biochemist, Analyst, Researcher or Scientist required." Part H.14 therefore clarifies that the requisite five years of experience must be "progressive" in nature. Part H.14 also expands the list of alternate occupations in which the Petitioner will accept experience to include chemists.

On the labor certification, the Beneficiary attested to more than 12 years of related experience. He stated that he worked full-time for a pharmaceutical company in India as a chemist from July 2000 to January 2012. He also stated that, from February 2012 until the petition's priority date in October 2016, he worked for the Petitioner as a laboratory analyst and biochemist. Pursuant to 8 C.F.R. § 204.5(g)(1), the Petitioner submitted letters from itself and the Beneficiary's former employer in India to support his claimed, qualifying experience.

[1] This petition's priority date is October 31, 2016, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner also submitted copies of the Beneficiary's post-secondary diplomas and transcripts. These documents indicate that Indian universities awarded the Beneficiary a bachelor of science degree in November 1998 and a master of science degree in chemistry in March 2011. The Petitioner further provided an independent evaluation of the Beneficiary's foreign educational credentials. The evaluation concludes that the Beneficiary's three-year bachelor's degree equates to three years of U.S. university studies, and that his two-year master's degree equates to U.S. bachelor's and master's degrees in chemistry.

Contrary to the requirements of the offered position and the requested classification, however, the record does not establish the Beneficiary's possession of five years of post-baccalaureate experience. The evaluation indicates that the Beneficiary did not obtain a foreign equivalent of a U.S. bachelor's degree until March 2011. He then worked full-time as a chemist in India from March 2011 to January 2012, gaining about 11 months of qualifying experience.

The Beneficiary also worked for the Petitioner from February 2012 through October 2016, or about 56 months. But the Beneficiary attested on the labor certification that during this period he worked for only 25 hours a week. Twenty-five hours is 62.5 percent of a typical, full-time, 40-hour work week. Thus, multiplying 0.625 by 56 months indicates that the Beneficiary's work with the Petitioner equates to 35 months of full-time employment. *See Matter of 1 Grand Express*, 2014-PER-00783 *4 (BALCA Jan. 26, 2018) (similarly calculating that 29.5 months of 25-hour-a-week employment equates to 18.4375 months of full-time experience). Combining the 35 months of U.S. employment with the 11 months he gained in Indian, the record indicates the Beneficiary's possession of 46 months (or three years, 10 months) of full-time, post-baccalaureate experience. This amount falls below the five years required by the offered position and the requested classification.

On appeal, the Petitioner argues that, as stated in its letter, it employed the Beneficiary from February 2012 through October 2016 for 30 hours a week. The Petitioner contends that the Beneficiary's post-baccalaureate experience includes 1,840 hours with his Indian employer (46 weeks x 40 hours a week) and 7,350 hours (245 weeks x 30 hours a week) with the Petitioner. The Petitioner also notes that the DOL considers 35 hours to constitute a full-time work week. *See* Memorandum from Barbara Ann Farmer, Adm'r for Reg'l Mgmt., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 2 (May 16, 1994), https://wdr.doleta.gov/directives/corr_doc.cfm?docn=289 (last visited May 18, 2018). The Petitioner therefore argues that the Beneficiary's post-baccalaureate hours of employment from March 2011 through October 2016 total 9,190, exceeding the minimum amount required for five years of full-time employment, or 9,100 (260 weeks x 35 hours a week).

The record, however, does not establish that, from February 2012 to October 2016, the Petitioner employed the Beneficiary for 30 hours a week. The Petitioner has not explained why the Beneficiary attested on the labor certification that he worked during that period for only 25 hours a week. *See Matter of Ho*, 19 I&N Dec. 482, 491 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). Copies of IRS Forms W-2, Wage and Tax Statements, establish the Petitioner's employment of the

Beneficiary from 2012 through 2016. But the Forms W-2 do not indicate the number of hours the Beneficiary worked. The Petitioner submitted copies of the Beneficiary's payroll records for only three months of 2017, and these records indicate that, for two of the months, the Beneficiary worked less than 30 hours a week. The Petitioner therefore has not demonstrated that, from February 2012 to October 2016, the Beneficiary worked 30 hours a week.

Moreover, a labor certification employer cannot rely on experience that a foreign national gained with it, unless he or she gained the experience in a substantially different position than the one offered or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, a "substantially comparable" position means a position "requiring performance of the same job duties more than 50 percent of the time." 20 C.F.R. § 656.17(i)(5)(ii).

Here, the Petitioner has not demonstrated the impracticality of training a U.S. worker for the offered position. The record also does not establish that the Beneficiary gained experience with the Petitioner in a position substantially different than the offered one.

Rather, the record indicates that the offered job and the Beneficiary's positions with the Petitioner as a biochemist and laboratory analyst share several, common job duties. Based on the duties listed on the labor certification and in the Petitioner's employment letter, all three positions involve: ensuring the proper analysis of environmental samples for chemical contaminants; conducting research to identify and eliminate hazards and pollution; adhering to regulatory guidelines; performing tests and analyzing chemical components of samples; troubleshooting problems with testing equipment; studying field and laboratory data to make recommendations; ensuring adherence to safety protocols; preparing lab reports for clients; writing technical reports and preparing graphs and charts to document results; improving testing procedures and analysis; and studying changes and innovations in the field. The record does not indicate percentages of time the Beneficiary spent on his job duties as a biochemist and laboratory analyst. The record therefore does not establish that the Beneficiary gained experience with the Petitioner in a position substantially different than the offered one.

Thus, contrary to the requirements of the offered position and the requested classification, the record does not establish the Beneficiary's possession of five years of qualifying, post-baccalaureate experience.

III. ABILITY TO PAY THE PROFFERED WAGE

Although unaddressed by the Director, the record also does not establish the Petitioner's ability to pay the proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of chemist as $104,500 a year. As previously noted, the petition's priority date is October 31, 2016.

The Petitioner submitted copies of its federal income tax returns for 2016. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay the proffered wage the following year. Therefore, in any future filings in this matter, the Petitioner must submit copies of annual reports, federal income tax returns, or audited financial statements for 2017.

Also, USCIS records indicate that at least 12 other immigrant visa petitions of the Petitioner were pending, approved as of, or filed after, this petition's priority date of October 31, 2016.[2] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions I-140 petitions from October 31, 2016, until the other beneficiaries obtained lawful permanent residence.[3] *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).

In any future filings in this matter, the Petitioner must provide the proffered wages and priority dates of its other petitions. The Petitioner should also submit evidence of any wages it paid to applicable beneficiaries in 2016 or thereafter. The Petitioner may also submit additional evidence of its ability to pay, including evidence in support of the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum requirements of the offered position and the requested classification. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of C-E-L-, Inc.*, ID# 1432598 (AAO May 30, 2018)

[2] USCIS records identify the Petitioner's 12 other petitions by the following receipt numbers: SRC 18 902 80915; SRC 17 181 50380; SRC 17 144 50511; SRC 17 040 50275; SRC 16 105 50129; SRC 16 019 50257; SRC 16 019 50224; SRC 15 205 50288; SRC 14 214 50389; SRC 12 240 51230; SRC 11 901 27605; and SRC 10 001 51274.

[3] The Petitioner need not demonstrate its ability to pay the proffered wages of any petitions that were denied, withdrawn, or revoked without a pending appeal or motion.